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9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF CALIFORNIA
11

12 NUTRISHARE, INC., a California corporation,

13 Plaintiff,

14 v.

15 BioRx, LLC, an Ohio Limited Liability
Company,

16 Defendant.
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Case No. 2:08-cv-01252-WBS-EFB

Complaint filed June 4, 2008

**DEFENDANT BioRx, LLC'S OBJECTIONS
TO EVIDENCE SUBMITTED BY
PLAINTIFF IN SUPPORT OF ITS
OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS OR TRANSFER
VENUE**

DATE: August 11, 2008
TIME: 2:00 p.m.
CRTM: 5
JUDGE: Hon. William B. Shubb

21 Defendant BioRx, LLC ("BioRx") hereby submits the following evidentiary objections to
22 the evidence cited below and filed by Plaintiff Nutrishare, Inc. ("Plaintiff") in support of its
23 Opposition to Defendant's Motion to Dismiss or Transfer Venue. BioRx hereby requests and
24 moves that the Court sustain its objections and strike the evidence on the grounds set forth below:

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1 **I. DECLARATION OF RODNEY OKAMOTO**

2 **Objection #1:**

3 Testimony: Page 2, lines 11-16, "Through an Internet search, we learned that NutriThrive
4 may have at least one customer within the district. Specifically, on the Parent-2-Parent on-line
5 forum . . . we found a post by a woman in Redding, California, Jessi who states she is the parent of
6 two boys, Jaxson, and Joshua. In this post, Jessi states 'I am working with NutriThrive right
7 now.'"

8 Ground(s) for objection: FRE 602, lack of personal knowledge; FRE 104 lack of
9 foundation; FRE 802, hearsay.

10 **Objection #2:**

11 Testimony: P. 3, lines 18-20, "During the Oley Conference, my colleagues and I met a
12 woman named Rosemarie Mielke, who informed us that she lives in Lancaster, California and
13 used to be a customer of NutriThrive but switched her TPM provider to Crescent Health."

14 Ground(s) for objection: FRE 802, hearsay; FRE 602, lack of personal knowledge; FRE
15 104 lack of foundation.

16 **Objection #3:**

17 Testimony: P. 3, lines 21-28, "Pursuant to the Oley Foundation's rules and policies,
18 Nutrishare, NutriThrive, and the other exhibits were not permitted to solicit new customers outside
19 the two-hour exhibition period that occurred on the Friday and Saturday of the conference. . . .
20 Kathryn Bundy, approached me and informed me that NutriThrive's representatives were
21 aggressively soliciting her making her feel uncomfortable. NutriThrive's actions were in
22 contravention of the Oley Foundation's rules."

23 Ground(s) for objection: FRE 104, lack of foundation; FRE 602, lack of personal
24 knowledge; FRE 802, hearsay.

25 **Objection #4:**

26 Testimony: P. 4, lines 1-3, "In order to further confirm whether BioRx d/b/a NutriThrive
27 was conducting business in California, I and my colleagues called NutriThrive's number and asked
28 if they service TPN patients in California. They answered 'yes.'"

1 Ground(s) for objection: FRE 701, improper opinion testimony of a lay witness; FRE 802,
2 hearsay; FRE 602, lack of personal knowledge; FRE 104 lack of foundation.

3 **Objection #5:**

4 Testimony: P. 4, lines 3-5, "One of Nutrishare's patients in California also asked
5 NutriThrive to send her more information regarding its products and services. NutriThrive sent
6 her a full 'start-up' packet, which included their business card."

7 Ground(s) for objection: FRE 104, lack of foundation; FRE 602, lack of personal
8 knowledge; FRE 802, hearsay.

9 **II. DECLARATION OF APARNA RAJAGOPAL DURBIN**

10 **Objection #6:**

11 Testimony: P. 1, lines 24-28, "Based on a search on www.google.com, I learned that
12 BioRx was an exhibitor in the 2005 annual meeting of the American Association of
13 Neuromuscular and ElectroDiagnostic Medicine, which was held in Monterey, California.. A true
14 and correct copy of the list of exhibitors at this conference . . . is attached hereto as Exhibit A."

15 Ground(s) for objection: FRE 104, lack of foundation; FRE 602, lack of personal
16 knowledge; FRE 802, hearsay.

17 **Objection #7:**

18 Testimony: P. 2, lines 1-7, "Based on the same Google search, I learned that on the same
19 day as the Oley Conference this year – June 26 – BioRx was in attendance and marketing its
20 products and services at the Neuropathy Action Foundation's 'Neuropathy Action Awareness Day'
21 at the University of California San Francisco's Mission Bay Conference Center. A true and
22 correct copy of the list of exhibitors at this conference . . . is attached hereto as Exhibit B."

23 Ground(s) for objection: FRE 104, lack of foundation; FRE 602, lack of personal
24 knowledge; FRE 802, hearsay.

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Objection #8:

Testimony: P. 2, lines 8-15, "Also based on a Google search, I learned that BioRx worked with Bayer Healthcare, based in Berkeley, California, to publish a children's book on hemophilia entitled 'The Great Inhibitor,' in July, 2006. True and correct copies of press releases announcing this joint venture . . . are attached hereto as Exhibit C."

Ground(s) for objection: FRE 104, lack of foundation; FRE 602, lack of personal knowledge; FRE 802, hearsay.

Objection #9:

Testimony: P. 2, lines 16-19, "Also based on a Google search, I learned that in 2006, BioRx had a Director of Business Development for the 'West,' Julie Winston. True and correct copies of excerpts from the presentation made by Julie Winston at the 2006 Infusion Nurses Society Annual Meeting . . . are attached hereto as Exhibit D."

Ground(s) for objection: FRE 104, lack of foundation; FRE 602, lack of personal knowledge; FRE 802, hearsay.

Objection #10:

Testimony: P. 2, lines 20-21, "Our client was able to identify at least one family within this judicial district that uses NutriThrive products and services on the on-line forum www.parent-2-parent.com."

Ground(s) for objection: FRE 104, lack of foundation; FRE 602, lack of personal knowledge; FRE 802, hearsay.

III. DECLARATION OF KATHRYN BUNDY**Objection #11:**

Testimony: P. 2, lines 2-8, "Kathleen responded that NutriThrive works with patients in California, would send one of its nurses to California to help me get started on TPN, and would subsequently have a local nurse from one of the several agencies in the area assist me with TPN. Kathleen said that NutriThrive has relationships with several nursing agencies in California. I also asked if NutriThrive was accredited by the American Commission on Healthcare (ACHC), to which Kathleen responded, 'yes.'"

1 Ground(s) for objection: FRE 802, hearsay; FRE 104, lack of foundation; FRE 602, lack
2 of personal knowledge.

3 **Objection #12:**

4 Testimony: P. 2, line 15-20, "The first thing I noticed at the conference this year was that
5 NutriThrive's name was almost everywhere. I don't remember the Oley Foundation playing
6 favorites in the past like it did with NutriThrive this year. For example, there were signs all over
7 the buffet tables on the first full day of the conference indicating that lunch was sponsored by
8 NutriThrive. I really felt that this compromised the integrity of the conference, which should be
9 all about the consumer and not the company."

10 Ground(s) for objection: FRE 104, lack of foundation; FRE 602, lack of personal
11 knowledge; FRE 701, improper opinion testimony of a lay witness.

12 **Objection #13:**

13 Testimony: P. 2, line 23 – P. 3, line 2, "... I was approached by a woman I didn't know. I
14 don't remember her name, but she ... started asking me questions about myself. As the discussion
15 continued, she seemed to be pumping me for more information and I started to feel uncomfortable--
16 -- like I was being courted or wooed. I asked the woman if she was a TPN consumer, and she
17 responded that her daughter was a TPN consumer, and when I asked her who her TPN provider is,
18 she said she uses NutriThrive, and finally revealed to me that actually, she works for NutriThrive.
19 It was inappropriate, and actually against the rules of the conference, for NutriThrive to be
20 soliciting me in that manner."

21 Ground(s) for objection: FRE 104, lack of foundation; FRE 701, improper opinion
22 testimony of a lay witness; FRE 802, hearsay.

23 **IV. DECLARATION OF SHEILA MESSINA**

24 **Objection #14:**

25 Testimony: P. 1, lines 24-26, "When I heard about NutriThrive, it occurred to me that the
26 name 'NutriThrive' sounded quite similar to 'Nutrishare,' the name of my current TPN provider."

27 Ground(s) for objection: FRE 701, improper opinion testimony of a lay witness.

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Objection #15:

Testimony: P. 1, line 28 – P. 2, line 1, "Although I did not actually approach their booth, I again was curious and wondered who they were."

Ground(s) for objection: FRE 401, 402, irrelevant.

Dated: August 4, 2008

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